SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 186

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

BELLANCA CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 6, 1961.

CITATIONS TO OPINIONS BELOW.

Three opinions were rendered in the United States District Court for the Northern District of Illinois: each is unreported. The first, a memorandum opinion of District Judge Philip L. Sullivan, is printed in Appendix A hereto. The second opinion, by the same Judge, is contained in Appendix B hereto. The third, by Judge Fred L. Wham is printed in Appendix C. The opinion of the Court of

Appeals, printed in Appendix D hereto, is reported in 288 F. 2d at 784.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 6, 1961. Rehearing was denied April 28, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Bellanca Corporation, Respondent here, filed suit against Bankers Life and Casualty Company, Petitioner, seeking four million dollars as the price or value of shares of stock of a corporation sold by it to petitioner. Petitioner raised affirmative defenses showing that the stock in question was listed on a national exchange; that Respondent owned in excess of 10% of the issued and outstanding shares so that it was an "insider"; that the contract of sale was violative of Section 16 of the Securities and Exchange Act of 1934 in that all of the stock sold was not owned and in any event was not delivered within 20 days so that under Section 29 of the Act all of Respondent's rights arising out of the transaction were void.

This defense, in the sequence of judicial decision, was avoided and eventually judgment was rendered against petioner in the amount of one and a quarter million dollars, first, by the holding that petitioner was estopped to raise the defense; secondly, by a claim that the contract was divisible, and, in any event, did not apply to transactions not taking place on an exchange; and, by the Court of Appeals, on the basis that the violation was irrelevant despite the plain language of the statute.

This case therefore raises significant questions concerning the effect to be given the explicit statutory directive embodied by Congress in Section 29 of the Securities and

Exchange Act of 1934 as applied to the persons and matters governed by the "insiders" section of that Act (Section 16). These questions are:

(1) Is Section 16 of the Securities and Exchange Act of 1934, Section 78p of Title 15 U. S. C. A., violated by a contract for the sale of shares of stock of a corporation listed on a national exchange where the seller is an "insider" and does not own the full number of shares sold?

(2) Is Section 78p of Title 15 U. S. C. A. violated by a contract for the sale of shares of stock of a corporation listed on a national exchange where all of the shares covered by the contract, if owned, are not delivered within the time period prescribed by the Securities Act of 1934?

(3) May recovery be had for the value of shares delivered in partial performance of a contract violating the Securities Act of 1934, where the Act, Section 29 of the Securities and Exchange Act of 1934 (78cc(b) Title 15 U. S. C. A.) provides that every contract involving a violation of the Act shall be void as regards *any* rights of a violator?

(4) Whether state law governs the rights of a violator of the Securities and Exchange Act of 1934 rather than the Act itself?

STATUTES INVOLVED.

The Statutes involved are Sections 16(a) and (c) and Section 29(a) and (b) of the Securities and Exchange Act of 1934 (§ 78p, sub-paragraphs (a) and (c) and § 78cc, sub-paragraphs (a) and (b) of Title 15 U. S. C. A.). These are printed in Appendix E.

STATEMENT OF THE CASE

On May 8, 1956, Bankers Life and Casualty Company (hereinafter referred to as Bankers) entered into a contract with Bellanca Aircraft Corporation (subsequently known as Bellanca Corporation and hereinafter referred to as Bellanca). By the terms of this contract, Bellanca was obliged to deliver 51% of the issued and outstanding common stock of Automatic Washer Company (hereinafter referred to as Automatic). This was a minimum of 1,112,500 shares which Bellanca represented in the contract as owned by it. 500,000 shares of Automatic were delivered to Bankers, pursuant to the contract, upon its execution. The remainder of the shares were to be delivered within a 90 day period (the contract is set forth in full App. 31-42).

At the time of execution of the contract, Bankers was to and did supply Bellanca with certain commitments to lend in excess of Five Million Dollars on the security of the properties of certain corporations, the stock of which corporations was held by Bankers and which was to be transferred to Bellanca in exchange for the Automatic stock.

These commitments were to be used by Bellanca to finance the building of a tanker by a shipbuilding company (App. 361). The time of transfer of the shares of stock in the various corporations to Bellanca was not stated in the contract.

The ninety day period for the delivery of the balance of Automatic stock passed. The date of delivery set by the contract was August 8, 1956 (App. 31, 33). On that date, Bankers sent Bellanca a letter informing Bellanca that, because of Bellanca's failure to perform its end of the contract, Bankers declared the contract terminated and elected to retain the earnest deposit of stock (App. 43).

On September 5, 1956, Bankers received a letter from Bellanca's lawyers, replying to its August 8th letter, demanding performance of the contract on or before September 14, 1956 and directing Bankers not to exercise "any incidents of ownership" over the 500,000 shares of Automatic until it had performed the contract (App. 222-223).

Shortly after receipt of this letter, on September 12, 1956, Bankers filed a complaint in which Bellanca was named defendant, in the Circuit Court of Cook County, seeking a declaratory judgment as to the ownership of the 500,000 shares of Automatic stock received by it under the agreement (App. 13-14). It was this case, with subsequent amendments in the pleadings, which was removed to the District Court on the basis of diversity of citizenship, resulting ultimately in the judgment therein and this appeal.

Prior to trial of the case, Bellanca had filed a six count amended counterclaim (App. 69-103, Counts I through IV; App. 151-152, Count V; App. 234-236, Count VI). While these counts were pending, Bankers filed a motion for a summary judgment on each of the counts applicable to it (App. 184-185, 237).

The legal basis for the motion had been previously expressed in the affirmative defenses pleaded in answer to Bellanca's counter-claims. As set forth in Bankers' answer to Count VI (App. 240-242) this defense is as follows:

> 1. That Bellanca Corporation, counter-plaintiff herein, before and at the time of entering the contract herein sued upon, was directly or indirectly the beneficial owner of more than ten percentum (10%) of the common stock of Automatic Washer Company.
>
> 2. That the said common stock of Automatic Washer Company was at the time described registered on a national securities exchange, to-wit: the Midwest Stock Exchange.
>
> 3. That, by the terms of the contract herein sued upon, Bellanca Corporation agreed to sell and Bankers

Life and Casualty Company agreed to buy 1,112,500 shares of the common stock of Automatic Washer Company, plus an additional number of shares necessary to equal, when added to the aforesaid 1,112,500 shares, fifty-one percent (51%) of the issued and outstanding shares of Automatic Washer Company, including, as issued and outstanding, those shares of the Corporation subject to outstanding options.

4. That on August 8, 1956, there were outstanding options granting certain individuals the right to purchase from Automatic Washer Company 159,000 shares of common stock of said Corporation.

5. That at the time of the contract, Bellanca Corporation was the owner of only 715,000 shares of Automatic Washer Company.

6. That the contract sued upon was made and entered into as of the 8th day of May, 1956, and the contract further provided for its performance within ninety (90) days of said date.

7. That, in fact, there was no delivery against the sale as provided by said contract within the twenty (20) day period required by law or within any other period of time.

8. That Title 15, § 78p(c) U. S. C. A., being § 16 of the Securities and Exchange Act of 1934, provides as follows:

> "(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense."

9. That Title 15, §78cc (a) and (b) U. S. C. A., being §29 (a) and (b) of the Securities and Exchange Act of 1934, provides as follows:

> "(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.
>
> "(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of Section 780 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 780 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation."

> 10. That as a result of the facts as aforesaid and the statutory provisions here recited the contract sued upon is illegal, void, and unenforceable; that Bellanca Corporation has no rights thereunder; that further as a result of said violations Bellanca Corporation enters this Court with unclean hands.

The factual basis for the allegations made in Bankers' motion is found in Bellanca's answers to interrogatories propounded by Bankers (App. 53-56, 172-176); a stipulation of fact entered into between the parties (App. 232-234); and the deposition of Sydney Albert, President of Bellanca at the time the contract in litigation was entered into (App. 109-150). It was established that at the date of the contract, Bellanca owned only 900,000 shares of Automatic (App. 233). 715,000 shares stood in its own name and 185,000 shares were held in the name of Sydney Albert and two brokerage houses (App. 233). It was also established, by stipulation, that Bellanca's position that it was "owner" of sufficient shares to meet its commitment was based upon the inclusion of the shares of stock owned by Sydney Albert. No books or records supported Bellanca's "interest" in this stock, if any.

The undisputed and undisputable facts shown by the record at the time of Bankers' motion for summary judgment showed that Bellanca was not the owner of the shares it promised to exchange. On the face of the contract sued upon, and indeed on the face of all the pleadings of both Bankers and Bellanca was the further fact that the contract provided for the further delivery of the balance of the shares within 90 days and that this delivery had not been made and was never made.

The District Court Judge denied Bankers' motion for summary judgment and entered a memorandum opinion explaining his disposition of the motion (Appendix B). The Court did not reach the merits of the motion, concluding

that, since Bankers had filed a complaint affirming its right to keep the 500,000 shares of Automatic and alleging a breach of the contract, it was estopped from denying its invalidity.

To eliminate the claimed estoppel, Bankers subsequently, on its own motion, dismissed its complaint (App. 264-268), on the condition that the dismissal should not bar it from maintaining the defenses previously asserted.

Bellanca also on the eve of trial dismissed Counts I to IV inclusive of its counterclaim (App. 269). The case then went to trial only on Counts V and VI of Bellanca's counterclaim.

On the trial, Bellanca recovered a judgment of $1,250,000 (App. 503) being the market value as of August 8, 1956 of the Automatic shares retained by Bankers (App. 273). In addition, the trial court allowed interest at the legal rate from August 8, 1956 to the date of judgment.

The trial judge in ruling upon substantially the same facts as those set forth for Judge Sullivan on the motion for summary judgment, concluded that the contract was not void because the transaction did not take place on an Exchange (App. C). He further concluded that, even if the contract was void, Bankers was liable for the reasonable value of the stock (App. C).

The Court of Appeals in its turn did "not deem it necessary * * * to review the findings of fact or conclusions of law of the District Court." (Appendix D, p. D-5.) The Court proceeded to dispose of the appeal on the basis that Section 29 of the Securities and Exchange Act of 1934 rendered void only the *contract rights* of the party in violation.

From this premise and the further premise that the rights of the party not in violation remain unimpaired, the Court of Appeals drew the conclusion that the duties cor-

relative to the rights of the innocent party require payment in the present situation despite the statutory voiding of the violator's rights.

This attempted explanation was coupled in the Court of Appeals' opinion with the further statement (Appendix D, p. D-6):

> "Whether the seller's rights under the contract have been voided by § 78cc(b), or have become unenforceable because of its breach of the contract, the rights of the purchaser are to be measured by the law of the jurisdiction involved. Here the contract was made in Illinois. Bankers' election to retain the shares delivered was made in Illinois. The law of Illinois governs."

After these attempts to explain its position, the Court of Appeals, in apparent recognition of the analytical shortcomings of its opinion, escaped to the general (Appendix D, p. D-9):

> "Whatever difficulties may exist in accommodating abstract and formal concepts of contract law to the formulation of the rule evolved and recognized by the cases and authority above cited, and applied in Illinois, should be resolved by the 'overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it".' *Kelly* v. *Kosuga*, 358 U. S. 516, 520-521."

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals in the Instant Case Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The importance of the Securities and Exchange Act of 1934 and its correct interpretation needs no emphasis here. This Court, as recently as April 24, 1961, in granting certiorari in *Blau* v. *Lehman*, 81 S. Ct. 1048 implicity has recognized the general importance of the statutory proscriptions governing the actions of those deemed "insiders" under Section 16 of the Act.

This interest should extend to the remaining subparagraphs of that Section which are here involved. While the Court of Appeals stated that it was not necessary to pass on the question of whether or not Section 16(c) was in fact violated, the record is clear that violations both as to lack of ownership and delivery did occur.

On this posture of the case, the importance of a fair and correct reading of Section 29 is apparent. It is difficult to say that the Court of Appeals has misread that section for, in its opinion, the Court appears to refuse to construe the statutory language. Yet, the effect of the Court's opinion is to establish a construction of the statute which effectively negatives its plain, announced purpose. That purpose, in the language of the statute, is to "void" the "rights" of any person making or engaging in the performance of a contract in violation of the Act.

To reason, as did the Court of Appeals, that an innocent party's *rights* require the possessor of those rights to respond in damages to the wrongdoer, the rights of which, by statute, are void, would, absent this Court's grant of certiorari, leave this opinion on the books as the only judicial interpretation of these important statutes.

This interpretation established by indirection suffers not only from its analytical shortcomings but also marks a radical departure from guiding principles furnished by this Court's previous expressions relative to the defense of illegality.

The Court of Appeals has decided, despite the language of Section 29 of the Act which provides that a contract made or performed in violation thereof shall be void "as regards the right of any person who * * * shall have made or engaged in the performance of any such contract," that a violation of the Act "is without material legal effect." The Court went on to hold that the *rights* of the petitioner, purchaser of the shares of stock involved, were to be "measured by the law of the jurisdiction involved."

By an inversion of logic and by semantic error, the Court of Appeals proceeded then to illustrate that, under Illinois law, the "rights" of the purchaser referred to were, in the context of this case, the "*right*" to respond in damages to the extent of a million and a quarter dollars, to the violator of the Securities and Exchange Act.

As one of the aids in this extraordinary analysis, the Court cited and quoted the opinion in *Kelly* v. *Kosuga*, 358 U. S. 516, while overlooking the plain purport of the case and the cases cited therein. There, at page 519, this Court reaffirmed:

> "* * * State law governs in general the rights and duties of sellers and purchasers of goods, * * * the effect of illegality under a federal statute is a matter of federal law * * *."

The opinion cited quoted *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176-177, 63 S. Ct. 172, 173-174, 87 L. Ed. 1188:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules.

In such a case our decision is not controlled by *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296, 61, S. Ct. 995, 997, 85 L. Ed. 1361; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95, 62 S. Ct. 978, 982, 86 L. Ed. 1293; *Board of Com'rs of Jackson County* v. *United States*, 308 U. S. 343, 349, 350, 60 S. Ct. 285, 287, 288, 84 L. Ed. 313; *cf. O'Brien* v. *Western Union Telegraph Co.*, 1 Cir., 113 F. 2d 539, 541. *When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.* Constitution, Art. VI, cl 2; *Jacobin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209, 55 S. Ct. 674, 79 L. Ed. 1393; *Deitrick* v. *Greaney*, 309 U. S. 190, 200, 201, 60 S. Ct. 480, 484, 485, 84 L. Ed. 694." (Italics supplied.)

Returning to the *Kelly* case, it is of utmost importance that the result in that case was predicated solely on the basis that the Sherman Act does not provide for the avoidance of private contracts. Describing the *Corn Products* case (*D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 388, 59 L. Ed. 520) this Court in *Kelly* noted:

> "The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction."

Again in the *Kelly* case, the Supreme Court (at 521 of the U. S. Report) explained:

> "Supplying a sanction for the violation of the Act, *not in terms provided* and capricious in its operation * * * is avoided by treating the defense as so confined."

The "defense as so confined" is the confining of the defense of illegality to those cases where the failure to recognize the defense would encourage the illegal conduct. Here, apart from the specific provisions of the Securities and Exchange Act of 1934, the "short" sale in a falling market by an "insider" would be encouraged even apart from the plain proscriptions of the Act.

Under this Court's decisions then, federal law and federal policy govern. Whether the federal policy requires avoidance of plaintiff's rights here is the issue. The issue cannot, under these cases, be avoided, as attempted by the Court of Appeals, by reference to state law, especially state law which has nothing to do with the defense of illegality. Federal law governs. Its interpretation is the crucial issue on this appeal.

Certiorari should therefore be granted to insure that Federal law as expressed in Section 29 of the Securities and Exchange Act of 1934 govern this situation.

2. The Court of Appeals, in the Instant Case, Has Decided the Matter at Hand in Conflict With the Decisions of Courts of Appeal Dealing With the Same Subject Matter.

It is true that, as a case of first impression, no decision of a Court of Appeals can be said to be in direct conflict with the decision herein. However, the cases closest in point dictate a result squarely contrary to that arrived at herein.

Goldenburg v. *Bache and Company*, 5 Cir., 270 F. 2d

675, was cited to the Court of Appeals and distinguished on this basis, "the application of §78cc (b) was not reached because the action was not commenced within the period of limitations." Yet a reading of the case clearly shows that the result was not so circumscribed.

The facts revealed that in the transactions under examination, there had occurred violations of the Act and the regulations enacted pursuant thereto. The plaintiff, although a person not bound by the Act, was refused relief however because of the running of the limitations contained in the Act.

On the counterclaim, although the facts revealed that the liquidation of the plaintiff's account left a deficiency of $3,212.00, Bache & Co. (a party bound by the Act as Bellanca is in the case at bar) was refused any recovery.

The Court, at page 678, referred to Section 29(b) (15 U. S. C. A. 78cc(b)) which is the very section relied upon by Bankers in this action:

> "The provisions of 15 U. S. C. 78cc(b) provides that every contract made in violation of any provision of Chapter 2B of Title 15, U. S. C., or of any rule or regulation thereunder, the performance of which involves the violation of any provisions of the aforesaid chapter or any rule or regulation thereunder, shall be void, as regards the rights of any person who, in violation of any such provision, rule or regulation shall have made or engaged in the performance of any such contract."

The Court then stated at page 681:

> "As to the counterclaim of Bache and Company, an additional clear answer is that Bache and Company cannot recover from Mrs. Goldenberg any claimed indebtedness resulting from its own violations of the statute and regulation.
>
> "The district court properly left the parties where it found them, and its judgments are affirmed."

In effect Bache & Company by violating the margin requirements of the Act loaned Mrs. Goldenberg the money they sought to recover. They claimed that she was "indebted" to them just as Bellanca alleged in Paragraph 8 of Count V and Paragraph 9 of Count VI that Bankers was indebted to it.

It is certainly true that the Court of Appeals in *Goldenberg* did state that the statute of limitations applied; however, since it is far from clear that any applicable statute of limitations did bar this claim (and certainly none contained in the Securities and Exchange Act of 1934), the "additional clear answer" stated by the Court there was a required answer, and not dictum.

Kaiser-Frazer Corp. v. *Otis & Co.*, 2 Cir., 195 F. 2d 838, cert. den. 344 U. S. 856, 97 L. Ed. 664, 73 S. Ct. 89, was also cited by the petitioner and *distinguished* by the Court here on the basis that it "involved an attempt by the party in violation to enforce the contract."

Accepting this description, petitioner is frankly unaware of the distinction. Petitioner is not the "party in violation." Bellanca is. Bellanca sued alleging the execution of the contract, the partial delivery "in accordance with the terms of said contract," the retention of the shares of stock, and claimed that petitioner was indebted to it as a result to the amount of Four Million Dollars (App. 151-156).

In another count, the same recitations were made (App. 234-236). The only variation was that the claim requested the reasonable value of the shares delivered. This reasonable value was also alleged to be Four Million Dollars.

The contract forms, then, the nexus of any liability. No duty of petitioner to Bellanca existed without proof of and reliance on the contract. Both in pleading and in proof, Bellanca relied upon its contract, a contract under which, by statute, its rights were void.

In essence, then, the decision in the present case is squarely opposed to the *Kaiser-Frazer* case.

In assessing legal rights, it should make no difference whether the claim is for damages as in *Kaiser-Frazer*, for sums advanced on a client's behalf as in *Goldenberg*, or for payment of shares delivered as in the instant case. In each case allegedly there was an invasion of legal rights or, conversely, an alleged legal duty to respond with payment. Only in this case have those rights been recognized in the face of the statutory policy; only in this case has the legal duty been maintained.

CONCLUSION.

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case it to find the meaning of some not very difficult words." Justice Holmes dissenting in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400, 24 S. Ct. 436, 468.

It is not for petitioner to say that this is a great case. It seems obvious, however, that the fact of three opinions upon the issues in this case all seeking ways and means to avoid coming to grips with the real issue in the case, the effect of the statutory policy laid down by Congress in the Securities and Exchange Act of 1934, indicates most strongly a distortion of judgment and unwillingness to find the meaning of not very difficult words.

The failure of the Court of Appeals in its turn to meet

the issue herein and its disregard of "abstract and formal concepts of contract law" when these concepts are the product, not of judicial policy, but of deliberate legislative intent, calls for this Court to exercise that discretion intended to insure that federal policy be not only uniform but correct.

Respectfully submitted,

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APPENDIX A.

MEMORANDUM.

This law suit arises out of a contract between the parties. By this agreement Bellanca agreed to sell and Bankers agreed to purchase 1,112,500 shares of the common stock of the Automatic Washer Company ("Automatic") for a specified price of $8.00 a share or a total of $8,900,000; 500,000 shares were to be delivered upon the execution of the agreement and 612,500 shares were to be delivered ninety (90) days thereafter. Also ninety (90) days thereafter, Bellanca agreed to deliver to Bankers enough additional shares of Automatic so that Bankers would own 51% of the outstanding shares of Automatic.

Bankers agreed to pay the purchase price of $8,900,000 for the 1,112,500 shares by transferring to Bellanca: (a) shares of R & H Holding Corporation (which owned hotels) "valued for this purpose" at $2,450,000; (b) shares of the Col-Tex Oil, Incorporated "valued for the purpose herein" at $4,700,000; (c) stock of the Lincoln Oil Company "valued for the purpose herein" at $450,000; and (d) shares of the National Drilling Company "valued for the purpose herein" at $1,300,000.

Bankers also agreed to lend specified sums in return for mortgages on the hotel and oil properties of the corporations whose stock was transferred.

Bellanca delivered the first 500,000 shares as provided in the agreement but made no further deliveries. After the ninety (90) day period had gone by and no further delivery had been made Bankers retained these shares

but otherwise terminated the agreement. Bankers stated in a letter to Bellanca, "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock".

Bankers sued Bellanca to claim damages for the breach of contract. Bellanca has counterclaimed; Count V of its amended counterclaim is now before the court for consideration. Bellanca in this count asserts that it delivered 500,000 shares which were kept by Bankers and that it is entitled to receive payment for these 500,000 shares in cash at the contract rate of $8.00 per share, or $4,000,000. It now asks judgment on the pleadings for this amount on its Count V of the amended counterclaim.

Bellanca relies on Section 44 of the Illinois Sales Act (Chapter 121½ Ill. Rev. Stat. Ann. 44) which provides:

> "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received."

It is Bellanca's argument that this agreement was one for a sale of stock and that the Sales Act, therefore, applies. It contends that Bankers knew that no further deliveries of stock would be made after the original 500,000 was transferred and that Section 44 of the Sales Act requires that payment be made for the shares delivered at the contract rate. Further, it contends that Bankers' failure to pay for the stock which it had retained has confirmed the obligation to pay in stock to one to pay in cash at the rate of $8.00 a share.

The answer to this theory is that the Sales Act does not apply here for the reason that this is not a "contract of sale" and not covered by that Act (Chap. 121½ Ill. Rev. Stat. Ann. Sec. 1, et seq.). Section 1 defines "Contracts to Sell" as contracts "whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price." However, not every contract in which goods are sold is covered by this definition. Interpretation by the courts has made it plain that the Act covers sales in which the transfer of the property in a thing sold from a seller to a buyer for a price "*is the essence of the transaction*", *Chapin* v. *Tampoorlos*, 325 Ill. App. 219, 223 (1945). Thus in one case, although there was a sale of books, the court reasoned that the "express purpose of" the agreement was to create an agency, and the contract was held not to be a "sale", *Rudin* v. *King-Richardson Co.*, 37 F. (2d) 637, 645 (7th Cir., 1930). And in *Close* v. *Browne*, 230 Ill. 228, 240 (907), a contract for the transfer of land was found not to be a "sale" in the ordinary sense so as to involve a brokerage commission. The court pointed out that "while it is true that the owners of the Kansas lands parted with the title to the lands", they did it for the purpose of consolidating their various interests and not for the purpose of making a "sale". See also, *Fargo Glass & Paint Co.* v. *Globe American Corporation*, 161 F. (2d) 811 (7th Cir., 1947); *The Mercantile Trust Co. of Illinois* v. *Kastor*, 273 Ill. 332, 339 (1916); *Dorothy* v. *The Commonwealth Commercial Company*, 278 Ill. 629, 649 (1917).

Similarly, in the instant case it is apparent from the face of the contract that the "essence of the transaction" was not to sell any particular number of shares of the stock of Automatic. The completed transaction would have made Bankers the owner of 51% of the outstanding shares of Automatic and would have made Bellanca the owner of

shares in various other corporations. The end result would have been a financing by Bankers of certain property owned by the corporations acquired by Bellanca. As in *Close* v. *Browne*, *supra*, the primary motive and effect of the contract was evidently a complex adjustment of the relationship of the parties, not the sale of stock.

Alternatively, even if it be assumed, for the sake of argument, that the Sales Act does apply, Section 44 would not govern the situation. That section is headed "Delivery of wrong quantity" and plainly covers exactly the situation which it describes: delivery of a quantity different from that ordered. That is not the situation here—500,000 shares were to be delivered as the first step in the agreement and this was done—there was no discrepancy as to the amount delivered.

Again alternatively, Bellanca's argument cannot prevail even if it be assumed that Section 44 of the Sales Act governs. For Bellanca says that payment for the 500,000 shares delivered must be made at the "contract rate" and that Bankers' failure to pay has changed its obligation to deliver specified shares into one to pay in cash the $8.00 a share mentioned in the agreement. *The Pennsylvania Re-treading Tire Company* v. *Goldberg*, 305 Ill. 54 (1922), cited in support of this argument, carries its refutation. It is there made clear that the obligation to pay in cash rather than in kind after breach of contract arises when the agreement is primarily for a specific number of dollars, and the other consideration specified is merely a substitute for dollars. Here, on the contrary, it is plain that the transfer of stock in the oil and hotel companies from Bankers to Bellanca was the primary consideration, and that $8.00 a share was merely a convenient measuring stick. This is apparent from the arrangements for the subsequent financing of the properties belonging to these companies, discussed above. The contract as a whole makes it plain

that a cash payment was not contemplated by the parties. For this reason, the "contract rate" referred to in Section 44 cannot be interpreted to mean $8.00 a share in cash.

Bankers has also advanced an affirmative defense to the amended counterclaim based on the asserted invalidity of the entire contract under the Securities and Exchange Act. This defense is relevant to Bankers' motion for summary judgment on all counts of the amended counterclaim, which is not now considered. The present motion considered is that of Bellanca for judgment on the pleadings on Count V. That Count is limited to a demand for a money judgment for $4,000,000 for the 500,000 shares delivered. As the above discussion indicates, that motion must in any event be denied. It is accordingly unnecessary to consider the affirmative defense at this time.

The motion of Bellanca Corporation, counter-claimant, for judgment on the pleadings on Count V of the amended counterclaim will be denied.

PHILIP L. SULLIVAN,
Judge.

March 3rd, 1959.

APPENDIX B.

MEMORANDUM.

The facts with which this action is concerned are outlined in the Court's memorandum dated March 3, 1959, which denied a motion for judgment on the pleadings on Count V of Bellanca's amended Counterclaim. The present motion is by Bankers and John MacArthur (Counter-defendants) for summary judgment on Counts I, II, III, IV, V and VI of that Counterclaim.

Those Counts, briefly summarized, are as follows: Count I (against Bankers) recites that Bellanca is prepared to deliver the stock it promised, and asks that Bankers be required to perform its agreements under the contract. Count II, also against Bankers, asks damages for alleged breach of the contract. Count III adds as defendant John MacArthur (President of Bankers at the relevant time), alleges fraud in the inducement of the contract and asks damages in tort. John MacArthur is the sole defendant in Count IV, which asks damages for alleged fraud on his part. Count VI is against Bankers, and asks for the reasonable value of the stock retained by Bankers.

Bankers' motion for summary judgment is on the sole ground that the contract between the parties is void under Sections 16(a) and (c) and 29(a) and (b) of the Securities and Exchange Act of 1934 (Title 15 U. S. C. §78p(a) and (c) and 78cc(a) and (b)), and Bellanca accordingly has no rights under it. It is not necessary to consider the merits of this argument, since it contradicts the assertions of the complaint and Bankers is accordingly estopped from asserting it.

The contract is described in the Court's memorandum of March 3, 1959. The complaint (which attaches a copy of that contract), makes the following allegations:

> "4. Since entering into the aforedescribed contract, plaintiff has been at all times, and is presently, ready, willing, and able to perform all obligations undertaken by it under the aforesaid contract, but defendant has failed and refused to perform its obligations, in that defendant has not tendered or delivered to plaintiff such additional amount of the common stock of Automatic Washer Company, described in the aforesaid contract, as would constitute fifty-one percent (51%) of the issued and outstanding shares of said common stock.
>
> "5. On August 8, 1956 plaintiff notified defendant that by reason of defendant's breach of aforesaid contract, plaintiff had elected to declare the contract terminated and had elected to retain the shares of stock delivered to it as aforesaid, under paragraph 3(i) of the aforesaid contract. A true and correct copy of said notice is attached hereto as Exhibit B and by reference incorporated herein."

"Exhibit B" is a letter from Bankers to Bellanca and reads:

> "You are hereby notified that you are in default and have breached the contract between us dated May 8, 1956. Your default and failure to perform material provisions of said contract include • • •
>
> "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock."

These allegations necessarily affirm the validity of the contract; any rights Bankers claims to the stock are derived from it. Further, the assertion of a breach of contract assumes its validity. As plaintiff, Bankers has necessarily taken the position that the contract is a valid one. It cannot, in the same proceeding, take the position when it becomes counter-defendant that the same instrument

is void. Plaintiff counter-defendant is now estopped from asserting a claim inconsistent with its previous position (*Tenney Telephone Co. v. United States*, 82 F. 2d 788 (7th Cir., 1936); *Grant v. Springer*, 330 Ill. 280 (1928); *Ferns v. Chapman*, 211 Ill. 597 (1904)).

Counter-defendant, John MacArthur, did not join in the complaint, and is accordingly not estopped on the grounds just discussed. However, the two Counts in which he is defendant (III and IV), are based on alleged fraud in the inducement of the contract. These allegations have been denied by Mr. MacArthur. There are apparent disputes as to material facts and a summary judgment would be impossible.

The motion of Counter-defendants for summary judgment on Counts I, II, III, IV, V and VI of the Counterclaim filed by Bellanca Corporation is denied.

PHILIP L. SULLIVAN,
Judge.

September 16, 1959.

APPENDIX C.

OPINION.

In stating briefly the framework for my memorandum of opinion in this case I adopt paragraphs one, two and four of the preliminary statement by Judge Sullivan in his memorandum filed herein on March 3, 1959 when he denied the motion of Bellanca Corporation for judgment on the pleadings on Count V of the counterclaim. Judge Sullivan's statements accords with the evidence and reads as follows:

> "This law suit arises out of a contract between the parties. By this agreement Bellanca agreed to sell and Bankers agreed to purchase 1,112,500 shares of the common stock of the Automatic Washer Company ('Automatic') for a specified price of $8.00 a share or a total of $8,900,000; 500,000 shares were to be delivered upon the execution of the agreement and 612,500 shares were to be delivered ninety (90) days thereafter. Also ninety (90) days thereafter, Bellanca agreed to deliver to Bankers enough additional shares of Automatic so that Bankers would own 51% of the outstanding shares of Automatic.
>
> "Bankers agreed to pay the purchase price of $8,900,000 for the 1,112,500 shares by transferring to Bellanca: (a) shares of R & H Holding Corporation (which owned hotels) 'valued for this purpose' at $2,450,000; (b) shares of the Col-Tex Oil, Incorporated 'valued for the purpose herein' at $4,700,000; (c) stock of the Lincoln Oil Company 'valued for the purpose herein' at $450,000; and (d) shares of the National Drilling Company 'valued for the purpose herein' at $1,300,000."

* * * * *

> "Bellanca delivered the first 500,000 shares as provided in the agreement but made no further deliveries. After the ninety (90) day period had gone by and no further delivery had been made Bankers retained these shares but otherwise terminated the agreement. Bankers stated in a letter to Bellanca, 'We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock'."

In extensively amended pleadings Bankers Life and Casualty Company sued Bellanca for damages for breach of contract and Bellanca counterclaimed. In advance of trial on the merits the complaint, as amended, and Counts I through IV of the counterclaim were dismissed and the case came on for trial on Counts V and VI of Bellanca's counterclaim and Bankers' answers thereto.

In substance, Counts V and VI of Bellanca's counterclaim allege the sale and delivery to Bankers of 500,000 shares of stock of Automatic Washer Company. In Count V Bellanca seeks payment for the shares at the alleged contract price of $8.00 per share; in Count VI Bellanca seeks to recover the reasonable value of the shares of common stock of Automatic Washer Company which Bankers had caused to be transferred of record into its name and which Bankers on August 8, 1956 elected to retain, as evidenced by its letter in writing.

Bankers, answering Counts V and VI of the counterclaim, admit the factual allegations in both counts except that it specifically denies that it is liable to Bellanca on either count in any amount.

As an alternate and affirmative defense to each count of the counterclaim Bankers says that at the time the contract between the parties was entered into Bellanca was the beneficial owner of more than ten per cent of common stock of Automatic Washer Company and that the common stock of said company was at said time registered

on the Midwest Stock Exchange which was a national securities exchange; that by said contract Bellanca agreed to sell to Bankers 1,112,500 shares of the common stock of the Automatic Washer Company and the contract provided for its performance within ninety days; that the contract was void and unenforceable under the provisions of Section 16(c) of the Securities and Exchange Act of 1934 (15 U. S. C. A. 78p (a) and (c)) and that Section 29(b) of the Act (15 U. S. C. A. 78cc(b)) prohibits payment for the stock.

After consideration of the contract before the court in the light of the provisions of the sections of the Securities Exchange Act relied upon by Bankers I have come to the conclusion that the contract is not void because of the Act and that it does not violate the Act or offend its purpose. Under the contract a trade of common stock for common stock was agreed upon between the parties for investment purposes. The consummation of the contract neither required nor contemplated any dealing on the stock exchange and, in fact, none occurred. Furthermore, if the court be wrong in reaching this conclusion and if under the Securities and Exchange Act the contract was unenforceable for reasons urged by Bankers, I am of opinion that Bankers had no right to retain the 500,000 shares of common stock upon Bellanca's default except upon the condition that it recompense Bellanca for the reasonable value of the stock.

Since August 8, 1956 to the date of trial Bankers has paid no consideration for the stock.

Bellanca having defaulted under the contract, Bankers, by law and by all rules of fairness, had the right on August 8, 1956 when Bellanca's default occurred to return the stock and be released from further liability under the contract. Bankers, having wrongfully elected to retain the

stock, became liable to Bellance for its reasonable value on that day.

The proof offered to establish the reasonable value of the stock on August 8, 1956 was to the effect that the common stock of Automatic Washer Company sold that day on the Midwest Stock Exchange for a low of 2½ per share and closed at 2⅝ per share. It would appear that the market price thus disclosed is a fair and lawful measure of the reasonable value of the stock on August 8, 1956. In view of the history of the fall of the market for the stock between May 8, 1956 and August 8, 1956 the more realistic value on August 8 is measured by the low sale of 2½. I find, therefore, that when Bankers elected to retain the stock on August 8 it became obligated to pay Bellanca the sum of $2.50 per share for the 500,000 shares which Bellanca had delivered to Bankers on May 8, 1956 or a total sum of $1,250,000, with interest at five per cent per annum from August 8, 1956.

FRED L. WHAM,
United States District Judge.

Dated: June 22, 1960.

APPENDIX D.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1960—April Session, 1961

BANKERS LIFE AND CASUALTY COMPANY,
Plaintiff,
v.
BELLANCA CORPORATION,
Defendant.

No. 13190

No. 13190
BELLANCA CORPORATION,
Counter-Claimant-Appellee,
v.
BANKERS LIFE AND CASUALTY COMPANY,
Counter-Defendant-Appellant.

No. 13191
BELLANCA CORPORATION,
Counter-Claimant-Appellant,
v.
BANKERS LIFE AND CASUALTY COMPANY,
Counter-Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 6, 1961

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Bankers Life and Casualty Company[1] commenced a state court action against Bellanca Corporation[2] seeking declaratory judgment as to the ownership of 500,000 shares of common stock of Automatic Washer Company.[3] Bellanca answered and filed a counterclaim which, as amended, seeks recovery of $4,000,000.00 from Bankers for 500,000 shares of Automatic it delivered to Bankers. After amendments in the pleadings the case was removed to the District Court on grounds of diversity. Motions for summary judgment and judgment on the pleadings were denied; Bankers' complaint was dismissed on its motion; Bellanca dismissed Counts I to IV inclusive of its counterclaim; and the cause proceeded to trial without a jury on the amended counterclaim (Counts V and VI) and the amended answer thereto.

The District Court after entering findings of fact, conclusions of law, and filing a written opinion granted judgment for Bellanca on Count VI of the counterclaim in the amount of $1,250,000.00 plus interest from August 8, 1956 at 5% per annum. Both parties appealed.

Under date of May 8, 1956 Bankers and Bellanca entered into an agreement reciting Bankers' desire to purchase from Bellanca 1,112,500 shares of common stock of Automatic and Bellanca's agreement to deliver or cause Automatic to deliver an additional amount so that Bankers will own not less than 51% of the issued and outstanding shares of Automatic. In the agreement Bellanca represents it has good title to the 1,112,500 shares of Automatic and authority to sell them and to deliver or cause Auto-

1. Counter-defendant-appellant in appeal No. 13190 and counter-defendant-appellee in appeal No. 13191. Referred to herein as Bankers.

2. Counter-claimant-appellee in No. 13190 and counter-claimant-appellant in No. 13191 and known as Bellanca Aircraft Corporation at the time suit was filed. Referred to herein as Bellanca.

3. Referred to herein as Automatic.

matic to deliver additional shares so that Bankers shall own at least 51% of the issued and outstanding shares of Automatic. The agreement states that Bellanca "hereby sells" and Bankers "hereby purchases" 1,112,500 shares of the common stock of Automatic for a total purchase price of $8,900,000.00 or $8.00 per share and provides that delivery by Bellanca to Bankers shall be made as follows:

> "(i) 500,000 shares shall be delivered on execution of this agreement and
>
> (ii) 612,500 shares shall be delivered on or before such date as shall be ninety (90) days after the date of this agreement."

The contract provides that Bankers shall make payment of the purchase price by making transfers to Bellanca of stocks in four corporations which were owned by Bankers, the stocks being valued for that purpose at stated amounts. Bankers committed itself to make loans aggregating approximately $5,000,000.00 on the properties owned by the corporations whose stock was to constitute the purchase price. Any additional shares of Automatic needed to make up the 51% stock interest were to be delivered within the ninety day period at $6.75 per share.

Upon execution of the agreement Bellanca delivered the 500,000 shares of Automatic to Bankers. No further deliveries were made and upon expiration of the ninety-day period Bankers notified Bellanca by letter under date of August 8, 1956 that:

> "We hereby declare said contract terminated, and affirm our election to retain the earnest deposit of stock."

The defense by Bankers to Bellanca's counterclaim for recovery for the 500,000 shares it delivered and Bankers elected to retain is grounded on Bankers' assertion that the contract of sale and Bellanca's conduct with respect

thereto violated Section 16(c) of the Securities and Exchange Act, 15 U. S. C. A. § 78p(a) and (c),[4] and consequently by reason of the provisions of Section 29(b) of the Act, 15 U. S. C. A. § 78cc(b), it need not pay for the 500,000 shares.

Insofar as here pertinent § 78cc(b) provides:

> "(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be *void* (1) *as regards the rights of any person who, in violation* of any such provision, rule, or regulation, shall have *made or engaged in the performance* of any such contract, . . ." (emphasis supplied)

Bankers on its appeal (No. 13190) contends that the District Court erred in not sustaining its affirmative defense both on its motion for summary judgment and on the trial of the cause, and in any event erred in the allowance of interest. Bellanca on its appeal (No. 13191) contends that its recovery should be based on the purchase

4. Automatic stock was registered and traded on a national securities exchange, the Midwest Stock Exchange, and Bellanca owned more than 10% of Automatic's common stock. Bankers contends that Bellanca, an "insider", violated the first clause of § 78p(c) by selling stock neither it nor a principal for which it acted owned, and violated the second clause by failing to make delivery within twenty days. It was stipulated that on May 8, 1956, Bellanca was the beneficial owner of 900,000 shares and the District Court found that Bellanca's president owned 269,800 shares on May 8, 1956 and had authorized Bellanca to contract for the sale of the 1,112,500 shares. The District Court concluded that Bankers had failed to prove a violation of the Securities Act and in its opinion stated that in any event Bankers had no right to retain the 500,000 shares upon Bellanca's default except upon the condition that it recompense Bellanca for the reasonable value thereof.

price stated in the May 8, 1956 agreement ($8.00 per share) or on the market value of the stock on the date of the transfer of ownership to Bankers ($6.75 per share).

We do not deem it necessary for the purposes of this case to review the findings of fact or conclusions of law of the District Court in so far as they bear on the question of whether the agreement of May 8, 1956 or Bellanca's conduct with respect thereto constitutes a violation of either clause (1) or clause (2) of 15 U. S. C. A. § 78p(c). Under the provisions of § 78cc(b) the consequence of a violation is that the contract shall be void "as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, . . .". It is only the *contract rights* of the party in violation which are voided. The party in violation can not enforce his or its rights thereunder. But no rights of the party not in violation are impaired. And where, as in the instant case, the party charged with being in violation of § 78p(c) has by default in a material matter breached the contract, after having partially performed, and because of this breach is precluded from enforcing the contract against the other party, the presence or absence of a § 78p(c) violation is without material legal effect. The rights of the other party are the same in either event. The purchaser's rights are neither impaired nor regulated by § 78cc(b). That the rights of the purchaser are accompanied by correlative duties to the seller does not impinge upon the declared purpose and effect of the federal statute, where it applies, to void the *contract rights* of the seller.

We have considered *Goldenberg* v. *Bache and Company*, 5 Cir., 270 F. 2d 675 and *Kaiser-Frazer Corp.* v. *Otis & Co.*, 2 Cir., 195 F. 2d 838, relied upon by Bankers. Neither case holds nor infers that § 78cc(b) permits the party not in violation to accept performance or partial performance,

retain the securities delivered, without making payment. In *Goldenberg* the application of § 78cc(b) was not reached because the action was not commenced within the period of limitations. *Kaiser-Frazer* involved an attempt by the party in violation to enforce the contract. These cases do not support Bankers' position that it may retain the shares delivered without making any payment therefor.

Whether the seller's rights under the contract have been voided by § 78cc(b), or have become unenforceable because of its breach of the contract, the rights of the purchaser are to be measured by the law of the jurisdiction involved. Here the contract was made in Illinois. Bankers' election to retain the shares delivered was made in Illinois. The law of Illinois governs.

In *Richards* v. *Shaw*, 67 Ill. 222 the plaintiff had only partially performed his contract to sell and deliver 500 bushels of corn at an agreed price. The defendant urged that the plaintiff could not recover without showing completion of the contract. The court (p. 224) stated:

> "It is a rule, supported by a very respectable weight of modern authority, that, if the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfill his contract. *Oxendale* v. *Wetherell*, 9 Barn. & Cressw. 386; *Shipton* v. *Casson*, 5 ib. 378; *Booth* v. *Tyson*, 15 Vt. 515; 2 Story Con. sec. 847; 2 Parsons Con. 668, and cases cited in note; *Bowker* v. *Hoyt*, 18 Pick. 555.
>
> Although this rule may be a relaxation of the earlier and more generally received doctrine, that the entire performance, on the part of the vendor, of such a contract as the one in question, is a condition

precedent to the payment of the price, and the maintenance of an action for its recovery, the rule seems to be a fair and just one, and we are disposed to give it our acquiescence."

In *Oxendale* v. *Wetherell*, 9 Barn. & Cressw. 386, 109 Eng. Rep. 143, cited by the court, the rule was laid down as follows:

"Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered."

In *United States* v. *Molloy*, 2 Cir., 144 Fed. 321, 324 the court quoted *Oxendale*, as above, with approval and added:

"To the same effect is *Boucker* v. *Hout*, 18 Pick. (Mass.) 555; *Richards* v. *Shaw*, 67 Ill. 222, and cases cited.

In Benjamin on Sales (7th Ed.) Bennett's Notes, p. 80, Mr. Bennett says:

'With us also it has been frequently held, in conformity with *Oxendale* v. *Wetherell*, that if part of an entire order for goods is accepted and retained after or with knowledge that the whole will not be furnished, an implied contract arises to pay pro rata, subject in some courts to a counter claim for damages for noncompletion. *Boucker* v. *Hout*, 18 Pick. (Mass.) 555, an excellent illustration; *Richards* v. *Shaw*, 67 Ill. 222; *Flanders* v. *Putney*, 58 N. H. 358; *Harralson* v. *Stern*, 50 Ala. 347; *Sentell* v. *Mitchell*, 28 Ga. 196; *Goodwin* v. *Merrill*, 13 Wis. 658; *Booth* v. *Tyson*, 15 Vt. 518; *Shaw* v. *Badger*, 12 Serg. & R. (Pa.) 275; *Rulz* v. *Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Saunders*

v. *Short*, 86 Fed. 225, 30 C. C. A. 462 and cases cited.'

Mr. R. N. Benjamin states the rule as follows:

'It is a rule supported by the weight of modern authority, that, if the buyer of a specified quantity of goods sold under an entire contract, receive a part thereof, and retain it after the seller has refused to deliver the residue, there is a severance of the entirety of the contract, and the buyer becomes liable to the seller for the price of such part; but he may reduce the seller's claim by showing that he has sustained damage by the seller's failure to fulfill his contract.' R. N. Benjamin's Principles of Sales, p. 146, § 3, and cases cited."

In Williston on Contracts (2d Ed. 1937), Vol. 5, § 1474 at pp. 4121-2 the following observations are made concerning the rule and the legal theories involved:

". . . But if the deficient quantity of the goods was delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here accordingly, if the seller recovers payment for what he has furnished and the buyer has not returned, it must be on the principles of quasi contract. It is true that it has often been said that a contract will not be implied by law in favor of one who is in default under an express contract, but the injustice of allowing the buyer to retain the benefits of goods without paying for them is so clear that even in England, where quasi contractual rights are generally most strictly limited, recovery has been allowed, and without the aid of a statute the weight of authority in the United States strongly supports this view.

* * * * *

The measure of damages in such an action is not necessarily the contract price even if the contract fixes a price by number, weight, or measure, . . . As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received, . . ."

Whatever difficulties may exist in accommodating abstract and formal concepts of contract law to the formulation of the rule evolved and recognized by the cases and authority above cited, and applied in Illinois, should be resolved by the "overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it' ". *Kelly* v. *Kosuga*, 358 U. S. 516, 520-521.

Bankers' election to retain the 500,000 shares of stock delivered obligated it to pay for the same. Its self-serving characterization of the 500,000 shares as an "earnest deposit" is wholly without foundation either under the terms of the contract or the evidence in the record. Nor was there a provision for forfeiture or liquidated damages in event of default.

Under Count V of its counterclaim Bellanca seeks to recover $4,000,000.00 as the "contract price" of the shares delivered. Under Count VI it seeks to recover $4,000,000.00 as the "reasonable value" of the shares at the time of delivery.[5]

The District Court found the reasonable value of the stock on the date of Bankers' election to retain it, August 8, 1956, to be $2.50 per share—the lowest market value on that date. The principal sum of the judgment is computed on that basis. In our opinion the District Court did not err in measuring the recovery by such market value on the date of Bankers' election.

The $8.00 per share figure recited in the contract, and claimed by Bellanca to govern, cannot be wrested from its context. At the most, it was the price Bankers was willing to pay for 1,112,500 shares *if* it obtained such additional shares at $6.75 per share as would give it 51% stock ownership of Automatic and, *if* it could make payment

5. The market value on the date of delivery, May 10, 1956 was $6.75 per share.

for the 1,112,500 shares by transfer of stocks it owned in four other corporations at the agreed valuation. Under these contractual provisions consideration of $8.00 per share as the "contract price" would be wholly unjustified and unrealistic.[6] In addition, insofar as the market price on the date of delivery ($6.75 per share) is concerned Bellanca's default and breach, which made it impossible for Bankers to complete the contract, did not occur until August 8, 1956, when it failed to make delivery of the balance of the shares as required under the contract. Under the facts here involved we are of the opinion that the measure of Bankers' liability should be restricted to the value it received—the value of the stock at the time it exercised its election to retain it. See Williston on Contracts, § 1474, *supra*. It could have returned the 500,000 shares and recovered any damages it sustained by reason of Bellanca's breach. But it elected to retain the shares and it makes no claim for damages.

Whether or not a party is entitled to interest under Ill. Rev. Stat. Ch. 24, § 2 because of "unreasonable and vexatious delay" depends upon the circumstances of each particular case. *People ex rel. Carpentier* v. *Central and Southern Truck Lines, Inc.*, 17 Ill. 2d 120, 124, 160 N. E. 777. Here the value of the shares retained was readily ascertainable by reference to a generally recognized standard—the market price on August 8, 1956—and the amount payable a simple matter of computation. Cf. *Harvey* v. *Hamilton*, 155 Ill. 377, 380, 40 N. E. 592, 593; *Kelley, Maus & Co.* v. *Caffrey*, 79 Ill. App. 278, 279.

On the record before it the District Court was justified in concluding that Bankers' refusal to pay for the shares it elected to retain was both unreasonable and vexatious.

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6. Consequently there is no "contract price" which would permit application of Ill. Rev. Stat. Ch. 121½, 44(1), relied upon by Bellanca.

The District Court did not err in the allowance of interest on the principal amount of the judgment.

In each of the appeals (No. 13190 and No. 13191) the judgment order of the District Court is affirmed.

AFFIRMED.

APPENDIX E.

TEXTS OF RELEVANT STATUTES.

(1) Section 16(a) and (c) of the Securities and Exchange Act of 1934,

§ 78p, subparagraphs (a) and (c) of Title 15 U. S. C. A. as follows:

> "Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month."

> "It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other

usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense."

(2) Section 29 of the Securities and Exchange Act of 1934, § 78cc subparagraphs

(a) and (b) of Title 15, U. S. C. A. as follows:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or

for whom any broker or dealer purchases, a security
in violation of any rule or regulation prescribed pur-
suant to paragraph (1) of subsection (c) of section 780
of this title, unless such action is brought within one
year after the discovery that such sale or purchase
involves such violation and within three years after
such violation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 186

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner,

vs.

BELLANCA CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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QUESTIONS PRESENTED.

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1. Where 500,000 shares of stock owned by the seller are sold and immediately delivered to the purchaser, and where the purchaser expressly elects to keep the stock after having an opportunity to return it, does the enforcement of a quasi-contractual obligation to pay reasonable value for the shares offend any provision of the Securities Exchange Act of 1934?

2. Was the contract of May 8, 1956 made, or performed, in violation of Section 16(c) of the Securities Exchange Act of 1934?

STATEMENT OF THE CASE.

In this action Bellanca seeks payment for 500,000 shares of stock which it sold and delivered to Bankers Life on May 8, 1956, and for which it has been paid nothing. Having made an election to retain the stock, the purchaser resists payment on the ground that the contract of sale was invalid under the Securities Exchange Act of 1934.

The District Court found no violation of the Act. It entered judgment for the reasonable value of the stock, rather than the contract price, since Bellanca had not performed the contract in full.

The Court of Appeals affirmed, also holding as a matter of state law that Bellanca could not recover at the contract rate. It assumed *arguendo* that the contract was void, and held that neither this assumption nor the default under the contract would preclude a recovery of reasonable value.

The essential facts are set forth in the findings of the District Court (App. 493-8).

On May 8, 1956, the parties entered into a written contract providing for the sale by Bellanca to Bankers Life of 1,112,500 shares of the common stock of Automatic Washer Company at a price of $8.00 per share (Fdg. 4, App. 494).[1] The contract provided for the immediate delivery of 500,000 shares, and delivery of the additional 612,500 shares within 90 days (Fdg. 6, App. 494). As provided, 500,000 shares were delivered upon execution of the contract, but

1. The entire contract, Bellanca Exhibit 2, is printed at App. 469-479. There was also a separate paragraph in the contract enabling Bankers Life to acquire additional shares from Automatic Washer at a price of $6.75 per share, if such additional shares were needed to give it 51% ownership of the company at the closing (App. 471). When the contract was signed, 1,112,500 shares represented more than 50% of the outstanding stock (App. 265).

the additional shares were not delivered (Fdg. 7, App. 494).

Exactly 90 days after the execution of the agreement, Bankers Life made a written election to terminate the contract and to retain the 500,000 shares which had been delivered (Fdg. 8, App. 494).

At all times since delivery of the 500,000 shares, Bankers Life has retained the stock (Fdg. 13, App. 495). At the trial, it offered no evidence to justify or excuse its retention of the stock without paying for it (Fdg. 20, App. 496-7). Record ownership of the shares was transferred from Bellanca to Bankers Life promptly after delivery and the change of ownership was reported to the Securities Exchange Commission and the Midwest Stock Exchange (App. 277, 273-4, 466, Bellanca Exhibit 1).

The 1,112,500 shares covered by the contract included 900,000 shares owned by Bellanca and 212,500 owned by the president of the corporation (Fdgs. 19, 9-12, App. 495-6). The president authorized Bellanca to enter into the contract to sell his shares, as well as Bellanca's, and without his authorization Bellanca would not have entered into the contract (Fdg. 19, App. 496). The purchaser was advised that part of the stock covered by the agreement was owned by the president of the company (Fdg. 17, App. 496). The contract did not require or contemplate any transactions on the Stock Exchange, and in fact, none occurred (App. 501).

When the contract was executed, the parties contemplated a final closing within less than 20 days (Fdg. 15, App. 496). Some delay was required to accommodate the purchaser, who had to make certain arrangements to pay the purchase price specified in the contract (Fdg. 16, App. 496). Nevertheless, it never did make any payment, or tender, of the price or any part thereof (Fdg. 20, App. 496-7, 315).

ARGUMENT.

I. The Implied Contract to Pay for the 500,000 Shares Was Perfectly Lawful and Petitioner Does Not Contend Otherwise. Accordingly, the Entire Petition for Certiorari Is Beside the Point.

The question discussed in the Petition for Certiorari is purely hypothetical since the record discloses no violation of Section 16(c) of the Securities Exchange Act of 1934. Nevertheless, the short answer to the petition is that given by the Court of Appeals.

As a matter of state law, when Bankers Life terminated the original contract and made its election to retain the 500,000 shares, a separate new obligation relating only to those shares was created. As a consequence of the election, an implied contract to pay for the 500,000 shares arose. *Richards* v. *Shaw*, 627 Ill. 222, 224 (1873); *United States* v. *Molloy*, 144 Fed. 321, 324 (C. A. 2, 1906); *Williston on Contracts* (2d Ed. 1937), Vol. 5, § 1474, pp. 4121-4123.

Even if we assume for the sake of argument that the original written contract was illegal and therefore void, the question is whether federal law precludes a recovery of the reasonable value of the 500,000 shares. These shares were owned by Bellanca at the time of transfer, and were immediately delivered to the purchaser. Petitioner does not even argue that the implied contract to pay for those shares violated the law in any way. Petitioner's attack on the transaction relates entirely to the undelivered 612,500 shares.

No doubt it would be improper to deny recovery on an illegal written contract and then to permit recovery on an implied contract that was also illegal. But such is not the

case here. There is nothing about the implied contract to pay for the 500,000 shares that even remotely offends the language or the policy of the Securities Act. Accordingly, there should be no question about Bellanca's right to be paid for its property.

II. There Is No Violation of Section 16(c) of the Securities Exchange Act of 1934.

Section 16(c) prohibits two types of transactions by insiders. Clause (1) prohibits a sale of more shares than are owned by the seller or his principal (i.e., a "short sale"). Clause (2) requires an insider to deliver his own shares against a sale within twenty days after the sale is consummated (i.e., to repay the loan of shares made to consummate a "sale against the box" within twenty days thereafter). See Loss, *Securities Regulation* (1951), 581.

The undisputed evidence showed that Bellanca owned the 500,000 shares at the time of their delivery to petitioner, and also that Bellanca or its principal owned more than the 1,112,500 shares covered by the contract (Fdgs. 9, 10, 12, 17, 18 and 19; App. 495-6). Thus, the issue of fact arising under the first clause of Section 16(c) was resolved against petitioner in the trial court's findings.

Clause (2) of Section 16(c) is inapplicable because Bellanca did not consummate the sale by making delivery to petitioner with borrowed shares. There was no occasion to cover a sale within the twenty day period after delivery to the purchaser.

There is no basis for petitioner's contention that the contract of May 8, 1956 contravenes Section 16(c).

III. Section 29(b) of the Securities Exchange Act of 1934 Does Not Apply to the Contract of May 8, 1956.

Section 29(b) applies only to contracts which are *made* in violation of the Act, or *performed* in violation of the Act. There was nothing about either the making of the original contract, or its actual performance, which violated the statute.

When the contract was made, Bellanca or its principal owned the shares covered by the contract, and both parties contemplated a complete delivery within less than twenty days (Fdg. 15, App. 496). Delivery after twenty days and before ninety days elapsed was permitted by the contract, but the agreement did not *require* a delay of more than twenty days and no such delay was intended. Therefore, at the time the contract was executed, it was lawful in all respects. It was not "made in violation of any provision of [the Act]".

The only performance of the contract was the immediate delivery of 500,000 shares which Bellanca owned. This performance did not "involve the violation" of any provision of the Act, and there was no further performance. Since neither the making nor the actual performance of the contract involved any violation of the statute, Section 29(b) has no application to the transaction.

Even if it be assumed that Section 29(b) is applicable, the statute does not render the contract totally and absolutely void. Nor does it void all rights arising out of the transaction, as petitioner seems to assume. The prohibited contracts are "void" only as to certain rights, only as to certain persons, and only for a limited period of time. The statute does not affect the purchaser's right to treat the contract as valid if it so elects. Thus, under the interpretation of the Securities Exchange Act most favorable

to it, petitioner, on August 8, 1956, had an option either to treat the contract as valid or to treat it as void.

Petitioner did not elect to rescind or to avoid the agreement. On the contrary, it expressly elected to terminate the contract and to create a separate obligation to pay for the retained shares. Petitioner does not even argue that the sale of the 500,000 shares, considered separately, involved any violation of the law.

IV. There Is No Conflict.

The two federal cases cited by petitioner do not support its reading of the Securities Exchange Act of 1934. *Goldenberg* v. *Bache & Company*, 270 F. 2d 675 (C. A. 5, 1959), involved a broker's violation of stock exchange regulations governing trading on margin. The violation resulted from an accounting error, in which the calculation of the value of a customer's account was computed on the basis of a stock named "Electronics", when the stock actually on deposit with the broker was "Eltronics". Neither the broker nor the customer discovered the mistake until after the period of limitation prescribed in Section 29(b) of the Securities Exchange Act had expired.[2] Therefore, although both parties contended that they had been injured by the mistake, neither could recover after the statute of limitations had run. Entirely apart from Section 29(b), the court also stated that since the broker had made the mistake, it could not recover any loss which it had caused itself. The decision has no relevance to the issue before this Court. The court did not suggest, and

2. The portion of Section 29(b) pertinent to that decision reads as follows:

"• • • no contract shall be deemed to be void by reason of this subsection • • • unless such action is brought within one year after the discovery that such sale or purchase involved such violation and within three years after such violation." See 270 F. 2d at 677, Note 2.

nothing in the opinion remotely implies, that the customer could have acquired securities from her broker and retained them without paying for them.

Petitioner also relies heavily on *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d 838 (C. A. 2, 1952). In that case the court held that the defendant, an underwriter, was not liable in an action for damages for breach of an executory contract. The defendant refused to perform its contract to purchase Kaiser securities and resell them to the public, on the ground that Kaiser's prospectus misrepresented its earnings. Kaiser argued that the defendant had knowledge of its actual earnings, and therefore was estopped to defend its refusal to perform on that ground. Since the performance of the contract would have involved a misrepresentation to the public and, therefore, a violation of the Securities Act of 1933, the court held that the contract was unenforceable, regardless of whether or not the underwriter was itself misled. There is not a word in the opinion that suggests that the underwriter could have accepted delivery of Kaiser securities, and then retained them without paying for them. Yet that is the conduct which petitioner asks this Court to sanction in this case.

CONCLUSION.

Petitioner has never indicated how the public interest would be advanced by permitting it to pocket 500,000 shares of stock free of charge. The judgment of the Court of Appeals does not enforce any conduct made unlawful by the Securities Act. Accordingly, this Court's comment in *Kelly* v. *Kosuga* is pertinent:

> "* * * Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra* (212 U. S. at 271) (dissenting opinion)." 358 U. S. at 520-521.

It is respectfully submitted that the petition for certiorari be denied.

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

Federal Policy Cannot Be Avoided by Reference to Irrelevant Decisions Enunciating State Law.

Respondent has attempted to foist on this Court, as it succeeded in doing in the Court of Appeals, an argument that the retention of the shares delivered pursuant to the illegal contract resulted in a quasi-contractual obligation being created.

The argument is specious in the extreme. The retention of the shares by petitioner is expressly stated by respond-

ent to result in an implied contract to pay. The initial paragraph of Section 29 of the Securities Exchange Act of 1934 (§ 78cc(a) Title 15 U. S. C. A.) specifies:

> "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

Petitioner could not therefore explicitly agree to waive a violation. It would be bitter doctrine indeed if, by its conduct, it could be held to have created an implied contract or to have incurred a quasi-contractual obligation more onerous than that rendered void by the Act.

Secondly, the cases from Illinois cited for the proposition that an obligation to pay for the shares received by petitioner are beside the point for two reasons. As pointed out in the reasons granting the writ, the decisions of this Court (*Sola Electric Co.* v. *Jefferson Electric Co.*, 317 A. 173, 176-177, 63 S. Ct. 172, 173-174, 87 L. Ed. 1188, and *Kelly* v. *Kosuga*, 358 U. S. 516, 519) plainly state that the effect of illegality under federal statutes is a matter of national rather than parochial law. Illinois precedents in the face of this principle, undisputed by respondent, simply have no application.

Further, not a single one of the authorities cited by respondent as "state law" is concerned with the defense of illegality. *Richards* v. *Shaw*, 67 Ill. 222, as well as the other authorities cited, is simply concerned with the obligation to pay for goods received and accepted although the entire quantity contracted for had not been delivered. The question of illegality did not enter into the discussion.

In Illinois, if state law is termed relevant, the rule directly concerned with illegal contracts is stated in 12 Illinois Law & Practice § 194, "Contracts," page 353:

> "Where parties to an illegal contract are *in pari delicto* and the contract has been executed on the part of one of them by a conveyance of property or the payment of money, neither party can recover anything transferred or paid under the contract."

A fortiori, where the guilty party seeks to recover from the innocent second party, no recovery can be had.

II.

The Securities Exchange Act of 1934 and the Contract Between the Parties.

The importance of certiorari in this case is only emphasized by respondent's arguments relative to the existence or non-existence of a violation of the Securities Exchange Act of 1934. In explicit terms, the Court of Appeals "did not deem it necessary" to review the findings of the District Court to determine whether the contract violated the Act. Indeed, the Court added, with reference to the circumstances of this case, "the presence or absence of a § 78p(c) violation is without material legal effect." (Appendix to Petition, p. D-5.)

The cavalier attitude toward the policies embodied in the Act as expressed in the Court of Appeals Opinion, is sufficient cause for the grant of certiorari.

The violation or non-violation not having been decided by the Court of Appeals, any argument directed thereto is beside the point. It is sufficient to note that respondent did not own the total of shares contracted to be sold and did not deliver the shares within the time limits of Section 16(c).

CONCLUSION.

Petitioner in this case is not charged with the duty of explaining "how the public interest would be advanced" by agreement with its position. Congress, in enacting Section 29 of the Act, has formulated its concept of how the public interest is to be protected—with a scope far greater than the immediate interests of either petitioner or respondent.

Insofar as the "public interest" is involved the breadth of the statutory proscription is matched only by the interest of the public that the Courts follow Congressional mandates.

It is respectfully submitted that certiorari be granted in order to insure the public's interest in both the statutory policy and the adherence of the Federal courts thereto.

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